

§ 752.604 Procedures.

(a) *Applicability.* The procedures provided in 5 U.S.C. 7543(b) apply to any appointee covered by this subpart.

(b) *Notice of proposed action.* (1) The notice of proposed action shall inform the appointee of his or her right to review the material that is relied on to support the reasons for action given in the notice.

(2) The agency may not use material that cannot be disclosed to the appointee or to the appointee's representative or designated physician under § 297.204(c) of this chapter to support the reasons in the notice.

(3) Under ordinary circumstances, an appointee whose removal has been proposed shall remain in a duty status in his or her regular position during the advance notice period. In those rare circumstances when the agency determines that the appointee's continued presence in the work place during the notice period may pose a threat to the appointee or others, result in loss of or damage to Government property, or otherwise jeopardize legitimate Government interests, the agency shall consider whether any of the following alternatives is feasible:

(i) Assigning the appointee to duties where he or she is no longer a threat to safety, the agency mission, or Government property;

(ii) Placing the appointee on leave with his or her consent;

(iii) Carrying the appointee on appropriate leave (annual or sick leave, leave without pay, or absence without leave) if he or she is voluntarily absent for reasons not originating with the agency; or

(iv) Curtailing the notice period when the agency can invoke the provisions of paragraph (d) of this section (the "crime provision").

(4) If none of the alternatives in paragraph (b)(3) of this section, is available, agencies may consider placing the appointee in a paid, nonduty status during all or part of the advance notice period.

(c) *Appointee's answer.* (1) The agency shall give the appointee a reasonable amount of official time to review the material relied on to support its proposed action, to prepare an answer orally and in writing, and to secure af-

fidavits, if the appointee is in an active duty status.

(2) The agency shall designate an official to hear the appointee's oral answer who has authority either to make or to recommend a final decision on the proposed adverse action.

(3) The right to answer orally in person does not include the right to a formal hearing with examination of witnesses unless the agency provides for a formal hearing in its regulations in accordance with paragraph (g) of this section.

(4) If the appointee wishes the agency to consider any medical condition that may have affected the basis for the adverse action, the appointee shall be given reasonable time to furnish medical documentation of the condition. The same procedures that are applicable in § 752.404(c)(3) of this chapter are also applicable for an appointee in the Senior Executive Service.

(d) *Exception.* Section 7543(b)(1) of title 5 of the United States Code authorizes an exception to the 30 days' advance written notice when the crime provision is invoked. This provision may be invoked even in the absence of judicial action if the agency has reasonable cause to believe that the appointee has committed a crime for which a sentence of imprisonment may be imposed. The agency may require the appointee to furnish any answer to the proposed action, and affidavits and other documentary evidence to support the answer, within such time as under the circumstances would be reasonable, but not less than 7 days. When the circumstances require immediate action, the agency may place the appointee in a nonduty status with pay for such time as is necessary to effect the action.

(e) *Representation.* (1) Under 5 U.S.C. 7543(b)(3), an appointee covered by this subpart is entitled to be represented by an attorney or other representative.

(2) An agency may disallow as an appointee's representative—

(i) An individual whose activities as a representative would cause a conflict of interest or position;

(ii) An employee of the agency whose release from his or her official position would give rise to unreasonable costs; or

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(iii) An employee of the agency whose priority work assignments preclude the employee's release.

(f) *Agency decision.* In arriving at its written decision, the agency may consider only the reasons specified in the notice of proposed action. The agency shall consider any reply of the appointee or the appointee's representative made to a designated official and any medical documentation furnished under paragraph (c) of this section. The agency shall deliver the notice of decision to the appointee at or before the time the action will be effective. The notice of decision shall inform the appointee of his or her appeal rights.

(g) *Hearing.* Under 5 U.S.C. 7543(c), the agency may, in its regulations, provide a hearing in place of or in addition to the opportunity for written and oral reply.

§ 752.605 Appeal rights.

(a) Under 5 U.S.C. 7543(d), a career appointee against whom an action is taken under this subpart is entitled to appeal to the Merit Systems Protection Board.

(b) A limited term or limited emergency appointee who is covered under § 752.601(c)(2) also may appeal an action taken under this subpart to the Merit Systems Protection Board.

§ 752.606 Agency records.

The agency shall maintain copies of the adverse action record items specified in 5 U.S.C. 7543(e) and furnish them upon request as required by that subsection.

PART 754 [RESERVED]

PART 771—AGENCY ADMINISTRATIVE GRIEVANCE SYSTEM

AUTHORITY: 5 U.S.C. 1302, 3301, 3302, 7301; E.O. 9830, 3 CFR 1945–1948 Comp., pp. 606–624; E.O. 11222, 3 CFR 1964–1969 Comp., p. 306.

§ 771.101 Continuation of Grievance Systems.

Each administrative grievance system in operation as of October 11, 1995, that has been established under former regulations under this part must remain in effect until the system is ei-

ther modified by the agency or replaced with another dispute resolution process.

[60 FR 47040, Sept. 11, 1995]

PART 772—INTERIM RELIEF

Subpart A—General

Sec.

772.101 Basic authority.

772.102 Interim personnel actions.

AUTHORITY: 5 U.S.C. 1302, 3301, 3302, and 7301; Pub. L. 101–12.

SOURCE: 57 FR 3712, Jan. 31, 1992, unless otherwise noted.

Subpart A—General

§ 772.101 Basic authority.

This part establishes a mechanism for agencies to provide interim relief to employees and applicants for employment who prevail in an initial decision issued by the Merit Systems Protection Board (MSPB) as required by the *Whistleblower Protection Act of 1989*, Pub. L. 101–12 (codified at 5 U.S.C. 7701(b)(2)(A)). The interim relief provisions of the law are applicable whether or not alleged reprisal for whistleblowing is at issue in an appeal to MSPB.

§ 772.102 Interim personnel actions.

When an employee or applicant for employment appeals an action to MSPB and the appeal results in an initial decision by an MSPB administrative judge granting interim relief under 5 U.S.C. 7701(b)(2)(A) and a petition for review of the initial decision is filed (or will be filed) with the full Board under 5 U.S.C. 7701(e)(1)(A), the agency shall provide the relief ordered in the initial decision by taking an interim personnel action subject to the following terms:

(a) Interim personnel actions shall be made effective upon the date of issuance of the initial decision and must be initiated on or before the date of a petition for review by the agency or within a reasonable period after the date it becomes aware of a petition for review by the appellant;

(b) The relief provided by interim personnel actions shall end: